

NO. 80759-1

SUPREME COURT OF THE STATE OF WASHINGTON

In re Dependency of A.B.
State of Washington,

Respondent,

v.

Rogelio Salas,

Petitioner.

ANSWER TO MOTION FOR DISCRETIONARY REVIEW

ROBERT M. MCKENNA
Attorney General

Kimberly A. Loran
Senior Counsel
#17430
1433 Lakeside Court, Suite 102
Yakima, WA 98902
(509) 575-2468

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
2001 NOV 13 P 1:26
BY RONALD R. CAMPBELL
CLERK

I. IDENTITY OF RESPONDENT

The Department of Social and Health Services is the respondent and the guardian of A.B., the 6-year-old girl who is the subject of this appeal. The child has been a dependent child and has been in the custody of the Department since shortly after her birth.

II. DECISION BELOW

The court of appeals affirmed the termination of the father's parental rights in an unpublished decision filed September 6, 2007. The court of appeals held (1) the statutory requirements for termination under RCW 13.34.180(1) and .190 adequately protected the father's constitutional right to the care, custody and control of his daughter, and (2) the findings of the trial court with respect to the statutory elements were supported by substantial evidence. The court of appeals decision conforms to well settled law and review is not justified by this Court under RAP 13.4(b).

III. ISSUE PRESENTED FOR REVIEW

Does the statute governing termination of parental rights under RCW 13.34 adequately safeguard the constitutional rights of a parent to the care, custody and control of a child?

IV. STATEMENT OF THE CASE

A.B. was born October 27, 2001 with cocaine in her system and was placed in foster care when she was just two days old. She was found to be dependent in February 2002. A.B.'s mother failed to take advantage

of services offered to her to help her correct her parenting deficiencies and her parental rights were terminated.¹

The father has a history of heroin use, domestic violence, incarceration and inability to parent his child. He was not married to the mother at the time of the child's birth and did not establish paternity until A.B. was eight months old.² He partially completed the services offered to correct his parenting deficiencies during the dependency. He completed felony drug court in the State of Nevada following a drug-related burglary conviction. He also participated in parent education services and domestic violence perpetrator treatment, but did not complete them.

Although the father was given opportunities to establish a relationship with his daughter through parent education services and visitation over a two year period, this relationship did not develop and contact between the father and the child became harmful and traumatic to the child as she reacted negatively to him at visitation, would not allow him to touch her and would not interact with him. The father's rights were terminated after the child had been dependent for nearly four years.

The father appealed the decision of the trial court to the court of appeals, which entered a decision on September 6, 2007 affirming the trial

¹ The mother has not appealed and is not a party to this appeal.

² Under the dependency and termination statute, a parent who is able to participate in the action is defined as a biological or adoptive parent, RCW 13.04.011(5).

court decision. The facts of the case are set forth in the Court of Appeals decision and are set forth in more detail within the argument below.

V. ARGUMENT

Parents have a constitutionally protected right to the care, custody, and companionship of their child. In the Matter of Sumey, 94 Wn.2d 757, 762, 621 P.2d 108 (1980). However, parents' constitutional rights are not absolute. When parental actions, decisions, or inability to act seriously conflict with the physical or mental health of the child, the parents' rights must be balanced against both the child's right to basic nurture, safety, and physical and mental health, and the State's right and responsibility to intervene to protect the child. RCW 13.34.020; *Krause v. Catholic Comty. Servs.*, 47 Wn. App. 734, 743, 737 P.2d 280 (1987). Therefore, the dominant concern on review should be the welfare of the child. *In the Matter of Sego*, 82 Wn.2d 736, 738, 513 P.2d 831 (1973).

The father asks this Court to accept review and then hold that consideration of the elements required to terminate parental rights under RCW 13.34.180(1) and .190 violates a parent's due process rights unless the state first proves that a parent has existing parental deficiencies. The father claims this issue raises an important constitutional question and is of substantial public interest.

The Court should deny review. First, the father's argument is based on the erroneous assertion that he had no parental deficiencies at the time of the termination trial. Second, the law is well settled that the statutory framework set out in the dependency and termination statute, RCW chapter 13.34, adequately protects a parent's substantive due process rights by requiring proof of current parenting deficiencies. The legal issues raised in the father's motion are well settled and there is no basis for granting review under RCW 13.4(b).

A. Proof of the Statutory Elements Required by the Termination Statute Establishes Parental Unfitness

The father essentially asks the court to require an initial finding of a current parental deficiency or unfitness before considering the statutory factors. Motion at 16-17. Because both the existing statute and case law require this finding, it is unnecessary to make a preliminary or threshold finding of parental deficiencies. The statute requires the state to prove:

....

(d) That the services ordered under RCW 13.34.136 have been expressly and understandably offered or provided and all necessary services, reasonably available, capable of correcting the parental deficiencies within the foreseeable future have been expressly and understandably offered or provided;

(e) That there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future.

RCW 13.34.180(1)(d) and (e). When the state proves these and the other factors required under RCW 13.34.180(1) “an implicit finding of current parental unfitness has been made.” *In re Dependency of J.C.*, 130 Wn.2d 418, 428, 924 P.2d 21 (1996).

There is a consistent body of case law in the court of appeals addressing the procedural due process rights the termination statute affords parents. In a recent decision, Division I of the Court of Appeals held that proof of the statutory factors for termination establishes that the parent-child relationship harms or potentially harms the child. *In re Dependency of I.J.S.*, 128 Wn. App. 108, 118, 114 P.3d 1215, *review denied*, 155 Wn.2d 1021 (2005). Division II of the Court of Appeals has also addressed this issue, and held that proof of the statutory factors includes a requirement that the state establish that parental deficiencies cannot be remedied within the near future. *In re Welfare of C.B.*, 134 Wn. App. 336, 345-36, 139 P.3d 1119 (2006). The statutory factors focus on prevention of harm or risk of harm to the child. *Id.* In the most recent decision addressing this question, Division II held that the termination statute is constitutional and does not violate parents’ right to due process. *In re Dependency of T.C.C.B.*, 138 Wn. App. 791, 158 P.3d 1251 (2007).

The father's motion raises nothing new. The issue has been examined by the courts on numerous occasions. There is no public interest in reopening this well settled question.

B. The Father Had Parental Deficiencies at the Time of the Termination Trial.

The court of appeals decision is consistent with the statutory requirement that a finding of termination be based upon current parental unfitness. Contrary to the father's argument, termination of his parental rights was based upon his current parental unfitness.

The cases cited by the father illustrate when a parent will be found to be a fit parent. For example, in *In re Churape*, 43 Wn. App. 634, 719 P.2d 127 (1986), "the only 'unremediable' condition testified to was lack of contact with the children prior to September 1983." *Id.* at 638. The father was deported on numerous occasions during the dependency. Despite this hardship, he obtained the required housing and employment, and visited the children twenty-five times over a two year period. "The DSHS counselor testified that Mr. Churape could be an adequate parent, who was fond of the children, and would be a gentle but firm disciplinarian." *Id.* at 638. The case was remanded for further consideration. *Id.* at 640.

In sharp contrast to the *Churape* case, the expert testimony submitted in this case established that the father's deficiencies involved more than just lack of contact with the child, A.B. Rather, in this case, the testimony established that the father not only had domestic violence issues that were not remedied, but there were also significant lack of attachment and bonding issues between him and his daughter that had not been remedied in over two years of service and visitation and would not likely be remedied in the near future. 1RP 37-38, 117-18, 281-86; CP 88 (FOF 1.17).³ Further, none of the Department witnesses testified he was currently fit parent to A.B. The only expert witnesses who testified the father was fit were his own experts/professionals, retained for the purpose of trial. The trial court rejected the father's experts' proposed transition plan as inappropriate, given the child's needs. Although there was

³ Father's Brief at the Court of Appeals indicated that there are nine volumes of verbatim report of proceedings as follows:

1RP	-	6/13/05
2RP	-	6/14/05
3RP	-	6/15/05
4RP	-	6/16/05
5RP	-	6/17/05
6RP	-	11/16/05
7RP	-	11/17/05
8RP	-	11/18/05, 11/21/05
9RP	-	11/22/05.

A supplemental volume of transcripts containing additional proceedings from 11/21/05 is referenced as 10RP followed by page number. See Father's Motion at 2, fn 1. For continuity and ease of reference, the same citations will be used herein in this brief as is used by the father in his briefing.

evidence in opposition to that presented by the Department, the trial court's findings were supported substantial evidence. *In re A.M.*, 106 Wn. App. 123, 22 P3d 828 (2001).

The father's reliance on *In re Dependency of T.L.G.*, 126 Wn. App. 181, 108 P.3d 156 (2005) is equally inappropriate. In *T.L.G.*, the court found that the parents had shown a "willingness to address their problems" and there was "scant" evidence regarding reunification. *Id.* at 206. There was expert testimony that the parents could make "demonstrable progress" in six months, and the GAL testified that "if the parents could make a complete turnaround in six months, reunification was in the best interests of the children." *Id.*

The last case relied upon by the father is and *In re: Interest of S.G.* ____ Wn. App. ____, 166 P.3d 802 (2007). In *S.G.*, the court concluded that the father had no parental deficiencies and that if there are no parental deficiencies identified, the availability of remedial services is irrelevant. *Id.* at 805. These are not the facts of this case. The trial court here specifically found that the father continued to have parental deficiencies that had not been corrected by the time of trial. CP 91 (FOF 1.32). Thus, *S.G.* is also inapplicable.

In this case, the Department presented evidence of the father's deficiencies through the testimony of its witnesses. In particular, the

parent educator, Steve Bergland, testified about his concerns about the lack of a father-child relationship and attachment, in spite of two years of parent education and visitation. 1RP 117-18; CP 88 (FOF 1.17). Rose Roberson, the domestic violence treatment provider, also testified about the continued need for the father to have domestic violence perpetrator treatment and the impact of the father's inability to protect his daughter if the father remained in an "unhealthy situation." 1RP 37-38, 40-41. Likewise, the Department social worker testified of the on-going parental deficiencies of the father and his lack of bonding and attachment with the child after an extended period of time of offering services and visitation and that the father did not currently possess the parenting skills needed to parent A.B. 1RP 281-86.

The Court of Appeals found that there was substantial evidence in the record to establish the statutory elements for termination of parental rights under RCW 13.34.180(1) and 13.34.190. Slip Op. at 20-24. The Court of Appeals also found that the evidence established the father's current parental unfitness (Slip Op. at 15-18) and correctly identifies that the case law states that "a court cannot end the parent-child relationship simply because the child has bonded to a foster care provider." Slip Op. at 18.

Here the evidence established that the father has a history of drug dependency, including heroin use. 1RP 78-79; 3-506. He started using drugs as a young man and entered drug court in Nevada around the time of the child's birth in October 2001 as a result of a drug-related burglary conviction. 1RP 80; CP 88 (FOF 1.16). He successfully completed that program in 2003 and has remained clean and sober since December 2001. 1RP 80; CP 88 (FOF 1.16). There is no dispute that he has remained clean and sober.

At the time of the child's birth, the father resided in Nevada. 1RP 77. He was not able to come to Washington State until 2003 and did not meet his daughter until February, 2003, when she was 16 months old. 1RP 74; 2RP 342; CP 87 (FOF 1.13).

The father did not re-locate to Washington State until June 2003. 1RP 81; 2RP 215-16. A regular visitation schedule was set up along with services, which included parent education classes, one-on-one parent education, urinalysis (UA) testing, and a domestic violence assessment and perpetrator treatment program. 2RP 200; 2RP 235.

The father completed a parenting assessment in July 2003, which recommended on-going parent education. CP 88 (FOF 1.17); Ex. 14. He participated in parent education until February 2005 when he re-located back to Nevada. 1RP 87; 1RP 114. In addition to providing individual

parent education at visitation, he also was provided and completed group parent education in both English and Spanish. 2RP 225-26; Exs. 10, 11, 12, 13. Although, overall, the father made improvement in his parenting skills, the parent educator, Steve Bergland, continued to be concerned about the lack of a father-child relationship and attachment -- even after two years of parent education and visitation. 1RP 117-18; CP 88 (FOF 1.17).

While living in Washington, the father became involved in a relationship with Christina Scott, an individual known to the Department. 1RP 175; 2RP 271-72. The father was advised by the social worker that it was not a good idea for him to associate with Ms. Scott due to her own issues, including mental health history and domestic violence. 2RP 271-72. A service plan, however, was identified for her as she was going to be part of the father's household. 2RP 263-64.

In January 2004, the father was assessed because of concerns of domestic violence in his relationship with Ms. Scott following his conviction for assault involving her in the fall of 2003. 1RP 16, 67. The father married Ms. Scott in May 2004,⁴ in spite of the concerns expressed by the social worker and the September 2003 domestic violence arrest and

⁴ The father and Ms. Scott have one biological child together (A.S., born on January 1, 2005) (1RP 185-86) and Ms. Scott has another child (G.S., born March 24, 2004) (3RP 423) that resided with her while she and the father resided together. 1RP 61; CP 89 (FOF 1.24).

conviction. 1RP 63; 2RP 232; CP 88 (FOF 1.18). Rose Roberson completed the domestic violence assessment and recommended a 20-week perpetrator treatment program. 1RP 24. Part way through that program, at week 10, the father admitted to being involved with two new and separate domestic violence incidents with his wife, Ms. Scott, in July 2004. 1RP 28; 1RP 36. Based upon his self-report, Ms. Roberson extended her recommendation for treatment to a 52-week perpetrator treatment program. 1RP 30; 1RP 32. The father did not complete this program. 1RP 32. Instead, he re-located to Nevada in March 2005. 1RP 34; 1RP 41.

In early 2005, in spite of the father's assertions that they were "separated," Ms. Scott was allowed by the father to reside in his home in Washington State, along with her child from another relationship, G.S. and A.S., the couple's child from the marriage, as well as Ms. Scott's disabled sister. 1RP 61; 1RP 63. It was while residing in the father's home that Ms. Scott failed to provide care for her disabled sister resulting in her conviction for criminal mistreatment. 1RP 64-65. The father asserted at the termination trial that he did not know what was happening in his home regarding the care Ms. Scott was giving her disabled sister. 3RP 499-500.

In July 2005, at the court's urging following phase one of the termination trial, the father initiated a dissolution proceeding. 5RP 909-12; 6RP 1005; Ex. 34. The couple's child, A.S., is currently in a

guardianship in Nevada with the paternal grandmother and step-grandfather. 6RP 1013; CP 89 (FOF 1.24); Exs. 35, 36, 37.

In July 2005, the father obtained a new domestic violence assessment in Nevada. The new assessment recommended a 26-week batterer's program. 6RP 1029-30; Ex. 64. In late September 2005, he finally started a batterer's program. 6RP 1032-33; Ex. 64. At the conclusion of the termination trial in November 2005, the father had not completed a domestic violence batterer's treatment program. CP 89 (FOF 1.21).

Extensive visitation was offered to the father to assist him in establishing and maintaining a positive relationship with the child. A regular visitation schedule started in June 2003, after the father re-located to Washington State and was available for visitation. 2RP 219-20. He visited weekly, often times multiple times a week, between June 2003 and September 2003. 2RP 222. During this visitation time period, he seemed to be progressing in establishing a relationship with A.B. and the social worker recommended an increase in visitation, to include unsupervised visits, and a transition to the father's home. 2RP 227; 2RP 229; 2RP 230; 2RP 231-32. The transition plan was never accomplished. The father missed his first visit in the transition plan because he had been arrested for an assault during an incident involving Ms. Scott over the weekend. 2RP

232; CP 88 (FOF 1.18). This arrest lead to an assault conviction, his incarceration and an immigration hold being placed on the father. 1RP 67-68. He was incarcerated from September 2003 until December 2003. 1RP 68; 2RP 233.

Following his release from incarceration, there were concerns about the impact his absence had on A.B. An assessment of A.B. was completed in January and February 2004, by Tawnya Wright, a therapist. 2RP 236. Following that assessment, in February 2004, supervised visitation resumed, but the child's relationship with the father was different than it had been in September 2003, when she had last visited. 1RP 153; 1RP 154; 2RP 239; CP 90 (FOF 1.27). After visitation resumed, she did not want to engage with the father during visitation and would not interact with him. She would pretend to sleep during visitation. 1RP 94, 99, 110, 111 157-158.

Since the father's visitation resumed in February 2004, his visitation has remained supervised due to concerns regarding the lack of a bond and relationship between the father and A.B. and concerns of the harmful impact of visitation on A.B. The child would call the father names, she would ignore him, she would pretend to sleep during visits, she was slow to interact with him, she would not allow the father to touch her, she would not accept food from him, and she showed a lot of anger. 1RP

110-14; 5RP 740-41; 6RP 950-51, 1128, 1129, 1131, 1132. In spite of numerous visits, the father's relationship has not improved or returned to the point it had been in September 2003 and had not progressed to the point where unsupervised visitation or visitation without the presence of the foster care provider or foster grandmother could occur. 1RP 110-14; 2RP 235; CP 90-91 (FOF 1.29).

The child was assessed again by Martha Burns in the summer of 2005. Ms. Burns opined that A.B. had no special needs and would not benefit from therapy. 6RP 944-45; 6RP 952-53; 6RP 973. Ms. Burns could also find no reason why the child related to the father the way she did, as the child was able to interact and relate to others appropriately. 6RP 944-45; 6 RP 952. Ms. Burns observed the child being nervous and anxious with the father and that she needed a lengthy period of time at the beginning of each visit to get comfortable with the father. 6RP 944-45, 949. The child would stare at the ground and was not comfortable with physical affection from the father. 6RP 949-51. Ms. Burns did not observe an attachment between the father and child, nor even a "comfort level." 6RP 985.

In spite of the Department providing visitation over a two year time period to provide an opportunity for the father and child to bond and attach, and the father participating in services to remedy drug/alcohol,

parent education and domestic violence issues, his parental deficiencies remained—he was not able to develop and maintain a positive bond or attachment to the child. In addition, he was still in need of a domestic violence batterer's treatment program.

Thus, there is substantial evidence in the record to establish the father's current parental deficiencies. By establishing the father's current parental unfitness, the father's constitutional due process rights are protected. *See In re Welfare of T.R.*, 108 Wn. App. 149, 29 P.3d 1275 (2001); *In re the Dependency of I.J.S.*, 128 Wn. App 108.

C. The Trial Court Properly Considered the Relationship Between the Child and the Father.

The father erroneously implies that the trial court inappropriately weighed the child's relationship with her foster care providers (maternal relatives) against her relationship with her father. Motion at 18-19. This was not the case. The trial court did consider the child's lack of a relationship or attachment to her father, as this lack of relationship clearly interferes with the father's ability to provide care for his child on a day-to-day basis. A.B. cannot be left alone with her father without experiencing significant anxiety and trauma. A.B. will not make eye contact with the father, she will not allow him to touch her, she will not face him, she cries

for her caretaker. 1RP 118-19, 9RP 1652-53, 1727. The trial court properly found that father will not be able to adequately parent A.B.

The Court of Appeals has not sanctioned a “constitutionally defective termination proceeding—one predicated not on parental unfitness, but on the Department’s placement preference.” Father’s Motion at 19. Rather, the Court of Appeals reached a decision consistent with statutory and constitutional provisions. The Court of Appeals based its decision, as did the trial court, on the father’s current parental unfitness, consistent with *T.R.* and *I.J.S.*, *supra*. The Department made reasonable efforts to preserve the family unit and reunify the father and child. The father’s right to custody of his child, however, is not absolute. The state has an obligation to intervene and protect a child’s interests. RCW 13.34.020; *Krause*, 47 Wn. App. at 743.

The Court of Appeals properly determined that the father’s lack of progress in developing a healthy relationship with the child was harmful to the child and appropriately considered this finding in the termination proceeding.

VI. CONCLUSION


Based upon the foregoing, the Department contends the Court of Appeals decision does not raise a significant question of law under the state or federal constitution and does not raise an issue of substantial

public interest. Review by the Court is not warranted under RAP 13.4(b).

Accordingly, the Department respectfully asks this Court to deny the father's motion.

RESPECTFULLY SUBMITTED this 9th day of November
2007.

ROBERT M. McKENNA
Attorney General


KIMBERLY A. LORAN WSBA #17460
Assistant Attorney General